SUPREME COURT, U. S.

No. 763

NOV 22 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, A.D. 1968

BERNHARD ROSEE,

Petitioner,

VS.

BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation; JAMES E. BAGGOT, JR., and DONALD W. MORRISON, individually and d/b/a BAGGOT & MORRISON; HARRIS HAYWOOD; SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, and THOMAS HERR, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; JULIUS MAYER; WILBERT E. HUGE; ROBERT L. DAVID; THOMAS E. HOSTY; ROBERT C. LIEBENOW, individually and as President of the Board of Trade of the City of Chicago; WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago; JAMES J. COUGHLIN; ALBERT W. KIBBY; and SAM GORDON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Bernhard Rosee pro se prays that a Writ of Certiorari issue to review the final judgment of the United States

Court of Appeals for the Seventh Circuit entered May 28, 1968, on which rehearing was denied June 26, 1968.

OPINIONS BELOW

The one page Opinion of the Court of Appeals dated May 28, 1968, affirming the judgments of the District Court, is quoted in full in the Appendix and Petition for Rehearing denied June 26, 1968.

The Opinion, Judgment and Remanding Order of the District Court of June 13, 1966, are to be found in the Court of Appeals Appendix and Record pages 30-131, inclusive. Due to the precarious financial condition of the Petitioner, Petitioner prays that this Appendix be accepted without reprinting and that 10 copies be permitted to be filed. Neither Opinion is reported in the official reports.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 28, 1968 and Petition for Rehearing denied June 26, 1968.

The mandate has been stayed on motion of Petitioner pending filing of a petition in this Court. An extension was granted Petitioner by Mr. Justice Thurgood Marshall until November 23, 1968 to file this Petition. Jurisdiction is founded upon 28 U.S.C. Sec. 1254 (1).

The jurisdiction of this Court is predicated upon the following primary grounds:

1. The decision of the Court of Appeals in that it necessarily approved the District Court's Order denying Petitioner's right to make at least one amendment to his original Complaint constitutes a departure from the accepted course of judicial proceedings and is in conflict with

the decisions of this Court and other Courts of Appeal, particularly since Petitioner proposed to add an anti-trust count.

2. The decision of the Court of Appeals in failing to set forth the legal or factual basis for its ruling constitutes a departure from the accepted and usual practice in judicial proceedings.

3. The decision of the Court of Appeals constitutes a further conflict with decisions of this Court and other Courts of Appeal in that it approves the denial by the District Court of Petitioner's right to full discovery. Petitioner was prevented from exercising a non-discretionary right to oppose Defendant's Motion for Summary Judgment.

4. The decision of the Court of Appeals was contrary to decisions of this Court and other Courts of Appeal in that it approved the entry of the Summary Judgment where the District Court conceded dismissal was improper and extensive conflicting questions of fact were inherent in the case.

5. The decision of the Court of Appeals insofar as it approved the deprivation of Petitioner's right to a jury trial decided a federal question in conflict with applicable decisions of this Court.

QUESTIONS PRESENTED

1. May a trial judge after signing a subpoena duces tecum for the production of all government and other records requested by Petitioner (which order appears in Supplemental Appendix 9 to 12, inclusive), reverse itself and limit discovery to a random selection of three days' filing, all to be examined in camera over the objection of Petitioner? (See Supp. App. Court of Appeals 16-18 inclusive)

2. May the Court after signing an order for the production of records of Defendants deny Petitioner a motion to show cause for the production of such records? (Appendix Court of Appeals 23-24)

3. May the Trial Judge preclude inspection by Plaintiff of such records, thus in effect determining their relevancy alone in camera, without any opportunity for inspection by Plaintiff?

4. Does such conduct on the part of a District Court amount to a denial of the due process of law under the Fifth Amendment?

5. May a District Judge deny Plaintiff a trial by jury in open court so that the jury may be enabled to decide the relevancy of the documents involved, which action is a denial of due process?

6. May the Court take information or testimony in his private chambers from a Government agent (Piala — see Appendix Court of Appeals 123), and deny Petitioner the right to cross examine this agent, Mr. Piala?

7. May a District Judge act arbitrarily when he disregards the importance of The Commodity & Exchange Act passed by Congress for the protection of the public, namely, it is mandatory that each commission merchant must keep daily segregation records as provided in Section 1.32 of the Commodity and Exchange Act? In Appendix 125 Court of Appeals the Court stated: . . . "that cancelled checks were examined, that daily segregation statements were examined . . ." These are the only true and genuine records which could prove Petitioner's case. No other records can be substituted for these, but Petitioner was deprived of these records to establish his innocence.

8. Can a District Court and the Court of Appeals ignore the fact that the Board of Trade sold Petitioner's membership, without a court order, which was his sole means of livelihood, and which action is definitely a violation of the Fifth Amendment?

9. Was the entry of a Summary Judgment in conflict with Rule 56 in view of the inherently complex issues of fact including fraud demonstrated by the District Court's 100-page Opinion and Record?

PERTINENT STATUTES

Commodity Exchange Act As Amended, 7 U.S.C. 1-17.
28 U.S.C. Sec. 1254 (1).
Title 28 United States Code, Section 1441.
Title 28 United States Code, Section 1442 (a).
Title 28 United States Code, Section 1447.
Title 28 United States Code, Section 1443.
Federal Rule of Civil Procedure 56.

STATEMENT OF THE CASE

Petitioner, Bernhard Rosee, a member of the Board of Trade of the City of Chicago since 1944, commenced this action on July 15, 1963 in the Circuit Court of Cook County, Illinois, alleging that all of the defendants herein had joined in a conspiracy to 1) wrongfully deprive him of his livelihood and membership in the Board of Trade of the City of Chicago, 2) to falsify certain financial records, and 3), to convert and embezzle funds of the plaintiff to their own use. In pursuance of the aforesaid combination, conspiracy, confederation and agreement as so broadened, said co-conspirators did certain things as set forth in Petitioner's Complaint (App. Court of Appeals 1-16).

The Board is a corporation organized under a special act of the General Assembly of the State of Illinois, approved February 18, 1859. It is the nation's largest and most important agricultural commodity exchange. It is a duly designated contract market under the Commodities Exchange Act, Title 7 U.S.C., Secs. 1-17. Under said Act the Board is subject to extensive regulation and control, both as to its own operations and as to those of its members, by the Secretary of Agriculture and the Commodity Exchange Authority (CEA) empowered to administer the Act for the Secretary. The operations of the Board and its members are also subject to the provisions of the Sherman and Clayton Anti-Trust Acts, 15 U.S.C. Secs. 1 et seq.

The Defendant, A. W. Kibby, was the Chief Accountant of the Chicago office of the Commodity Exchange Authority, hereinafter called "CEA". Subsequently he became an Exchange Supervisor. The Defendant, Sam Gordon, was the Chief Investigator of the Chicago office of the CEA.

On July 29, 1963, on petition of the Department of Justice acting under 28 U.S.C. 1442 (a) and on behalf of Defendants Kibby and Gordon, a petition was filed in the United States District Court for the Northern District of Illinois to remove such cause from the state to the federal courts. The motion claimed such defendants had acted under color of office.

Following the removal order to the District Court Petitioner instituted discovery proceedings against the defendants for the production of records and documents. A subpoena *duces tecum* was issued in October, 1963 (See Suppl. App. Court of Appeals 9-12 inclusive).

Defendants resisted said subpoena. Petitioner filed a motion to show cause against Baggott & Morrison for failure to comply with the court orders of October 17, 1963 and December 17, 1964 (App. Court of Appeals 23, 24). The District Court denied the motion to show cause.

Petitioner called to the attention of the Court of Appeals in his Petition for Rehearing:

> "ALTHOUGH PLAINTIFF WAS PERMITTED VERY LIMITED DISCOVERY, SUCH RECORDS AS WERE OBTAINED, BY COURT ORDER FROM THE DEFENDANT, BAGGOTT & MORRISON, AND STATEMENTS MADE BY OTHER DEFENDANTS AFFIRMATIVELY SHOW MISREPRESENTATION, FORGERY, PERJURY, FALSIFIED RECORDS, MANUFACTURED RECORDS, MANIPULATED RECORDS, CONVERSION OF FUNDS, EMBEZZLEMENT. . ."

But the Court of Appeals ignored the above facts.

On June 3, 1966, Petitioner requested leave to file an additional memorandum and amended complaint within 10 days. (App. Court of Appeals 25). He also requested the Court to defer ruling on Defendants' motion (App. Court of Appeals 25-29). These were denied by the Court on the same day.

The Court closed the discovery before Petitioner had the records which are required to be kept by each commission merchant for each customer, namely, the daily segregation records which are mandatory under Sec. 1.32 of the Commodity Exchange Act. (May 18, 1965—see App. Court of Appeals 24).

In the Court's opinion (App. Court of Appeals 125) it is stated that the Petitioner contended that the two Govern-

ment agents at one of the Defendant's direction, had submitted certain statements in answering a certain check list on Baggot & Morrison's operations. This check list stated that there were no unauthorized payments from segregated funds, that cancelled checks were examined, and that daily segregation statements were examined. These cancelled checks and daily segregation statements were denied to Petitioner.

While admitting (App. Court of Appeals 131) that the documents produced by the Defendants "involves but a muniscule portion of the total facts in the case", the Court nevertheless rendered a Summary Judgment and dismissed the two Government agents as Defendants and then remanded the balance of the case to the State Court.

In its Opinion the Court rejected Plaintiff's contention that it retain jurisdiction. The Court said: "There is no basis for asserting a claim against the United States in this proceeding, nor does the record disclose any facts which would give rise to an action against other federal officials."

Following the entry of the Summary Judgment Bernhard Rosee, plaintiff, presented a motion under Rule 60 (b) to set aside the Summary Judgment and to set aside the Remand Order. This motion included supporting data.

Motion under Rule 60 (b) was denied.

ARGUMENT SUPPORTING REASONS RELIED ON FOR THE ALLOWANCE OF PETITION

I.

THE COURT OF APPEALS ERRED IN NOT REVERSING THE DISTRICT COURT JUDGMENT AS PETITIONER HAD BEEN DEPRIVED OF THE RIGHT TO MAKE A SINGLE AMENDMENT TO HIS ORIGINAL COMPLAINT.

The denial by the District Court on June 3, 1966 of Petitioner's Motion that he be allowed to file an additional memorandum and ten days to amend was by implication affirmed by the Court of Appeals.[1] The failure of that Court to refer to this vital and other significant issues will subsequently be argued as additional reasons for granting this Petition. The denial of the right to Amend was in violation of Rule 15 for (1) the complaint had not been previously amended; (2) a formal timely motion was made by Petitioner (App. Court of Appeals 24-29); (3) the Defendants removed the case to the Federal Courts imposing upon Petitioner the additional burdens of time and money arising out of the transfer and dismissal; (4) the complaint on its face contained substantial allegations commonly presented under Title 15.

[1] Petitioner in his Appeal argued the District Court's denial of his Motion to Amend in his Amended Brief (p. 57) and his Reply Brief (p. 13). In his conclusion he requested the Court of Appeals to reverse the judgment below so as to "(a) to permit plaintiff to amend his complaint to add the United States of America as a defendant under the Federal Tort Claims Act, and add a count under the anti-trust law." (page 13).

The denial of the right to amend was particularly arbitrary in the light of the circumstances of the case. There was no dispute but that the facts upon which Plaintiff's claims rested were inter-related and frequently inseparable as to all the parties defendant. Though the District Court in its conclusion implies that the facts affecting Kibby and Gordon involved but a minor portion of the total facts, his opinion as a whole indicates that he was in error.

In the light of Rule 15 and the decisions of this and other Federal Courts, the District Judge was required to give Petitioner a reasonable time to amend his complaint to add the United States of America as a defendant under the Federal Tort Claims Act, and add a count under the antitrust laws.

The District Judge was informed that Petitioner was preparing an antitrust law action against the Board of Trade (see Supp. App. Court of Appeals 99).

Petitioner also, on June 3, 1966, requested only ten additional days to amend his Complaint (App. Court of Appeals 24-29). A long line of decisions reveals the District Court acted arbitrarily in denying leave to amend. *Foman* v. *Davis*, 371 US 178, 182 (1962), *Fuhrer* v. *Fuhrer*, 292 F 2d 140, 142, 143 (CA 7), *Peckham* v. *Scanlon*, 241 F 2d 761, 764, CA 7 (1957), *Bonanno* v. *Thomas, et al.*, 309 F 2d 320, 321, 322 CA 9 (1962).

The *Foman* case would seem to be controlling in that it, like the present suit, involved possible alternative causes of action. In *Foman*, the Court reversed both the District Court and the Court of Appeals for failure to permit the filing of an amendment based upon an alternative theory desire to amend. A similar error was committed here and the Petition should therefore be allowed and the judgments below set aside.

II.

THE COURT ERRED IN ENTERING SUMMARY JUDGMENT.

The Court committed fundamental errors in entering summary judgment on behalf of Kibby and Gordon.

The Court's sole function in determining the motion for summary judgment was to decide whether there is any "genuine issue as to any material fact" between plaintiff and Kibby and Gordon. Rule 56 (c), Federal Rules of Civil Procedure. When such an issue is found, the Court's function ends. *Homan Mfg. Co.* v. *Long,* 242 F. 2d 645, 656 (C.A. 7th, 1957); *American Security Company* v. *Hamilton Glass Co.,* 254 F. 2d 889, 893 (C.A. 7th, 1958).

This elementary rule is rigidly applied where (as in this case) the ultimate issue is one of conspiracy, requiring inquiry into defendants' purpose and intent. See *Alabama Great So. R. Co.* v. *Louisville & Nashville R. R. Co.,* 224 F. 2d 408, 411 (C.A. 2d 1956); *Subin* v. *Goldsmith,* 224 F. 2d 753, 758 (C.A. 2d, 1955).

Further, where (as in this case) plaintiff has demanded trial by jury, the Court may not supplant his judgment for that of a jury by resolving *any* factual issue. *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620, 627 (1944); *Hartford Acc. & Indem. Co.* v. *Northwest National Bank,* 228 F. 2d 391, 395 (C.A. 7th, 1955); *Preston* v. *Aetna Life Ins. Co.,* 174 F. 2d 10, 14 (C.A. 7th, 1949); *Campana Corporation* v. *Harrison,* 135 F. 2d 334, 335 (C.A. 7th, 1943).

Finally, the Court of Appeals for this Circuit has often held that if *any* doubt exists as to whether or not there is a genuine issue of fact, the doubt should be resolved against the party who has moved for summary judgment, and the opposing party should be accorded full opportunity to prove his case at the trial. *Hazeltine Research, Inc.* v. *General Electric Co.,* 183 F. 2d 3, 7 (C.A. 7th, 1950).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I. This Case Creates a Unique Problem which This Court Should Resolve.

Congress, for the protection of the public and the national welfare, enacted the Commodity Exchange Act in 1936 with provisions strictly regulating the manner in which each commission merchant must keep books and records for each customer in order to prevent cheating and defrauding by commission merchants of the public. Petitioner, although then a member of the Board of Trade cleared his trades through commission merchants, Baggot & Morrison, defendants herein.

Baggot & Morrison, like any other commission merchants, were compelled under the Commodity Exchange Act, to keep records under Sections 1.31 to 1.35 inclusive of said Act, especially Section 1.32 which reads as follows:

> **"Sec. 1.32 Segregated account; daily computation and permanent record. The amount of money, securities, and property which must be in segregated account in order to comply with the requirements of section 4d (2) of the Commodity Exchange Act shall be computed by each futures commission merchant as of the close of the market each business day, based upon his accounting records. A permanent record of such computation shall be made and kept in readily accessible form, together with all supporting data."**

Petitioner for the past nine years, including the arbitration proceedings and the later court proceedings, has been deprived of the daily segregation records under Section 1.32, which are the only records which could prove his case.

This case is a classic instance of the manner in which the intent of Congress to protect the public was ignored by a Federal Court which does not understand the daily workings of the Exchange. If this is permitted to stand it would give a green light to commission merchants to manipulate records knowing that the daily segregation records could not be subpoened.

II. Petitioner Was Denied The Right to Jury Trial by Wrongful Entry of Summary Judgment in Conspiracy and Fraud Case Contrary to Seventh Amendment to United States Constitution.

Petitioner made a proper demand for trial by jury. The United States Constitution guarantees him a trial by jury in this civil case involving far in excess of the requisite twenty dollar amount. *U. S. Const., Amend. 7*

Where vast amounts of financial transactions are involved, and a proper jury demand is made, a party is constitutionally entitled to a trial by jury in a case involving a *conspiracy, Inland Steel Prods. Co.* v. *MPH Mfg. Co.*, 25 F.R.D. 238 (N.D., Ill., 1959), or an *accounting, King* v. *United Ben. Fire Ins. Co.*, 377 F. (2d) 728 (10 Cir., 1967).

In addition, Petitioner's Brief to the Circuit Court of Appeals raised three additional factual issues upon which he was denied a right to contest:

1. Whether a particular account (No. 35) disclaimed by Petitioner was, in fact, his account.

2. Whether the deficits attributed to Petitioner in such account were his.

3. Whether the account's figures were accurately portrayed.

(See Appellant's Court of Appeals Amended Brief, pp. 16-26).

CONCLUSION

For the many reasons set forth herein and in order to avoid a harsh injustice, it is submitted that Petitioner's case should be heard by this Honorable Court.

In a special concurring opinion, Mr. Justice Douglas stated in *King* v. *Smith,* 391 U.S. ....., 36 U.S. Law Week 4711 (decided June 18, 1968):

> "The Court follows the statutory route in reaching the result that I reach on constitutional grounds. It is, of course, traditional that our disposition of cases should, if possible, be on statutory rather than constitutional grounds, unless problems of statutory construction are insurmountable. *E.g., Harmon* v. *Brucker,* 355 U.S. 579, 581."

Herein, Petitioner has demonstrated that there exist *both* important constitutional and statutory grounds, vitally affecting the procedural administration of federal Trial Courts as well as our Nation's public agricultural policy.

WHEREFORE, Your Petitioner prays that this Honorable Court grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

BERNARD ROSEE
Petitioner, Pro se